

**NO. PD-1346-17**

IN THE COURT OF  
CRIMINAL APPEALS OF TEXAS  
AUSTIN, TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
6/27/2018  
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**PABLO ALFARO-JIMENEZ,**  
**Petitioner (Appellant)**

**V.**

**THE STATE OF TEXAS**  
**Respondent (Appellee)**

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FOLLOWING THE GRANTING OF REVIEW  
OF FOURTH COURT OF APPEALS DECISION  
CAUSE NUMBER 04-16-00188-CR

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**STATE'S AMENDED BRIEF IN REPSONSE TO PETITIONER'S  
BRIEF ON PETITION FOR DISCRETIONARY REVIEW**

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This is a case of an unlawful sentence under section 37.10 of the Texas Penal Code, tampering with a government record, based upon the pleadings, the jury charge, the verdict, and the evidence. Because as evidenced by the jury charge, the jury convicted appellant of a third degree felony offense with a punishment range of imprisonment of not more than 10 years or less than 2 years, punishment by the trial court of one year county jail is unauthorized and unlawful. The Fourth Court had jurisdiction to remand the case to the trial court for proper sentencing.	
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## **STATEMENT REGARDING ORAL ARGUMENT**

This Honorable Court granted petitioner's petition for discretionary review on grounds four and five without oral argument. Counsel for the State agrees that oral argument is not necessary; and therefore, waives oral argument. However, should this Honorable Court decide that oral argument would be of benefit to the Court, counsel respectively requests permission to respond.

**NO. PD-1346-17**

<b>Pablo Alfaro-Jimenez</b>	§	<b>In the Court of</b>
<b>Petitioner</b>	§	
<b>v.</b>	§	<b>Criminal Appeals</b>
<b>The State of Texas</b>	§	
<b>Respondent</b>	§	<b>Austin, Texas</b>

**Brief for the State**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes, Nicholas “Nico” LaHood, Criminal District Attorney of Bexar County, Texas, and files this brief for the State.

**Statement of the Case**

Petitioner, Pablo Alfaro-Jimenez, was charged by indictment with the second degree felony offense of tampering with a government record; to wit: a Social Security card, with intent to defraud and harm another, cause number 2014-CR-9248 (C.R. at 4). The trial was before a jury in the 186<sup>th</sup> Judicial District Court of Bexar County, Texas, the Honorable Jefferson Moore, judge presiding. Petitioner was found guilty of the lesser included offense of tampering with a governmental record; to wit: a Social Security card, a third degree felony (C.R. at 37). Punishment was assessed by the trial court as a misdemeanor with confinement at one year suspended for two years and a \$1,500.00 fine (C.R. at 46).

The Trial Court's Certification of Defendant's Right of Appeal was filed indicating that petitioner had that right (C.R. at 38). Notice of appeal was filed (C.R. at 57).

Petitioner challenged the trial court's finding of consent for the search and probable cause to arrest and the sufficiency of the evidence to support the conviction. The State argued that the evidence was legally sufficient to support the conviction but the sentence imposed by the trial court was an unlawful sentence. The Fourth Court had jurisdiction to address this issue because a trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an unlawful sentence. *Mizell v. State*, 119 S.W.3d 804, 805 (Tex. Crim. App. 2003). Therefore, the State was not obligated to file a notice of appeal before the court of appeals could address that issue. *Id.* The Fourth Court of Appeals affirmed the conviction concluding that petitioner had been properly sentenced. *Alfaro-Jimenez v. State*, No. 04-16-00188-CR, 2017 Tex. App. LEXIS 7225 (Tex. App. — San Antonio, Aug. 2<sup>nd</sup>, 2017). The State filed a motion for rehearing that was granted. The Fourth Court substituted its original opinion affirming trial court but reforming the judgment to reflect the conviction was for a third degree felony and remanding for a new sentencing hearing. *Alfaro-Jimenez v. State*, 536 S.W.3d 579, 582 (Tex. App. — San Antonio 2017, pet granted) and petitioner's petition for discretionary review was granted by this Court on grounds four and five only without oral argument.

## **Summary of the Pertinent Facts**

### *State's Case*

On July 10<sup>th</sup>, 2014 Officer Rodriguez came into contact with petitioner, Pablo Alfaro-Jimenez, when he and Officer Blanquiz were dispatched to a location because a woman called saying her ex-boyfriend was banging and kicking the door trying to get in while yelling and screaming threats to her (3R.R. at 57, 49, 60, 61, m 75). The name of the suspect given by the caller was Juan Alberto Torres Landa (3R.R. at 61).

By the time Officer Rodriguez arrived at the location petitioner was gone but the complainant, Zoraida Rodriguez, was still inside the apartment and didn't want to come out because she was afraid of petitioner (3R.R. at 61, 74). After speaking with Ms. Rodriguez for quite some time, the officers started leaving on another call when petitioner came around the corner (3R.R. at 61, 62). Because petitioner had been kicking and beating on the door and making threats, the officers did not know what to expect from him so they did a weapon search and placed him in handcuffs for their safety (3R.R. at 62, 63, 64).

When petitioner approached the officers he told them he wanted to talk to them about what happened and set the record straight (3R.R. at 64). Officer Rodriguez asked petitioner what his name was and he said it was Juan Alberto Torres Landa (3R.R. at 64). Officer Rodriguez asked petitioner for proper

identification with his picture on it so he could confirm what he said (3R.R. at 64). Petitioner said it was in his wallet in his back pocket and he put his pocket towards the officer so he could get it out. When Officer Rodriguez opened the wallet petitioner said his ID was right there in the little slot. Officer Rodriguez took out the ID which had the same name on it and there was also an alien card with his name and Mexican driver's license. A Social Security card also came out and Officer Rodriguez could see the paper was too flimsy and ink was not dark like it should be (3R.R. at 64, 65). He also noticed that in the corner the ink had smeared which it won't do on a Social Security card (3R.R. at 65). All the identification had the name petitioner had given on it but Officer Rodriguez needed to verify the information so he called ICE and gave them the social security number on the card (3R.R. at 66). ICE ran the number and it was a good alien number but it came back to someone from Vietnam (3R.R. at 66).

Officer Rodriguez asked petitioner if he was in the United States legally and he said he was not (3R.R. at 67). Eventually petitioner gave his correct name which they verified through his fingerprints (3R.R. at 67, 73). Officer Rodriguez testified that the Social Security card is a government record issued by the United States Government Social Security Administration (3R.R. at 67). State's exhibit 4 is the false Social Security card that petitioner possessed and presented to Officer Rodriguez (3R.R. at 67, 68). The back of the card reads:



This card is the official verification of your Social Security number. Please sign it right away, keep it in a safe place. Improper use of this card or number by anyone is punishable by fine, imprisonment, or both. This card belongs to the Social Security Administration and you must return it if we ask for it.

For any other Social Security business/information, contact your local Social Security office. If you write the above address for any business other than returning a found card, it will take longer for us to answer your letter.

If you find a card that isn't yours, please return it to: Social Security Administration, P.O. Box 33008, Baltimore, Maryland, 21290-3008. Form SSA-3000. Social Security Administration.

(3R.R. at 69).

Petitioner was read his Miranda warnings and he was charged with tampering with a government document with intent to defraud (3R.R. at 66, 73, 74). State's exhibit 2-B, video recording of the encounter was admitted and published to the jury (3R.R. at 70, 72).

Agent Damian Reyes works for the United States Social Security Administration, Officer of the Inspector General here in San Antonio, Texas investigating all allegations of fraud, identify theft, Social Security number misuse, benefit program fraud, and financial crimes (3R.R. at 83, 84). Agent Reyes explained that Social Security cards are used as a government record with numbers specifically assigned to individuals (3R.R. at 84). Individuals misuse those numbers to defraud others when applying for employment, applying for loans and for social security benefits (3R.R. at 84). Social Security cards are issued by a

government agency and they are a government record (3R.R. at 85). Using a counterfeit card is an unlawful act (3R.R. at 85).

The information on State's exhibit 4 was the same information provided to Agent Reyes by SAPD (3R.R. at 85). Agent Reyes ran the number and verified that the Social Security number did not match the name; it was assigned to someone else (3R.R. at 86). For someone to use that card for identification purposes would be a misrepresentation of a valid Social Security card (3R.R. at 86). Use of these cards has a harmful effect on the person actually assigned the number (3R.R. at 87). People typically use counterfeit cards as sources of identification, a form of a government record (3R.R. at 86).

#### *Defendant's case*

At the time of the incident petitioner and the person<sup>1</sup> he has a relationship with had broken up (4R.R. at 10). Petitioner had nothing in his name including the car he bought using her name (4R.R. at 10). When they broke up she said she was going to take the car away from him and she threatened him (4R.R. at 10). The car was the only way for him to get around because he did not know anyone in Texas (4R.R. at 10). She called petitioner and told him she was going to take everything away from him (4R.R. at 10). Petitioner told her everything was going to be okay

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<sup>1</sup> Although petitioner never refers to his girlfriend by name, Officer Rodriguez testified her name is Zoraida Rodriguez.

and he was coming over so they could talk about it and solve the problems (4R.R. at 11).

Petitioner denied knocking on the door because her children were there but she was in the window so he asked her to come outside so they could talk (4R.R. at 11). She told petitioner they were going to call the police (4R.R. at 11). Petitioner admitted to breaking his phone as he told her that he didn't want to have any communication (4R.R. at 11, 12). She never came out of the house and he had to go back to work (4R.R. at 12). Once back at work, petitioner got a call from her (4R.R. at 12). Petitioner asked if she had called the police and if they were already there (4R.R. at 12). Petitioner told her he was coming back so they could talk in front of the police (4R.R. at 12). When he got there the police didn't let him talk, they handcuffed him and took his wallet (4R.R. at 12). One of the officers threw petitioner on the ground and broke his glasses and hurt his arm (4R.R. at 12). Petitioner denied giving the police permission to get his wallet and they never gave him a chance to talk (4R.R. at 12). Petitioner did admit that he told the officer he had identification and it was in his wallet (4R.R. at 13).

Petitioner admitted that he did not get the Social Security card from the Social Security offices but that he bought it for sixty dollars from a guy so he could get a job (4R.R. at 14). They made up the number he did not give them that number (4R.R. at 14). Petitioner admitted that he made up the name on the card

(4R.R. at 14). The only thing petitioner used the card for was to work (4R.R. at 15, 16).

Petitioner admitted he was in possession of the card (4R.R. at 16). Petitioner admitted to lying to the officer about who he was (4R.R. at 16). Petitioner admitted to buying the card from someone and that the name on the card is not his name (4R.R. at 16, 17). Petitioner admitted to lying to his employers and to police (4R.R. at 17).

### **State's Response to Appellant's Fourth and Fifth Grounds of Review**

This is a case of an unlawful sentence under the statute based upon the pleadings, the jury charge, the verdict, and the evidence.

It is not:

- An *Apprendi* case;
- A right to a right to a jury trial or due process case;
- A trial court's ruling based on a theory of admissibility case;
- A preservation or forfeiture case; or
- A jury charge error case.

### **Argument and Authorities**

Petitioner was indicted for the offense of tampering with a government record pursuant to sections 37.10(a)(5) & (4) of the Texas Penal Code (C.R. at 4).

Respectfully, the issue before the Court is essentially one of statutory construction. Canons of statutory construction require that a statute be construed according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the legislature could not have intended. *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009). This Court should focus on the literal text of the statutory language in question, reading it in context and construing it “according to the rules of grammar and common usage.” Tex. Gov’t. Code §311.011(a) (West 2017). There is an assumption that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. *Tapps*, 294 S.W.3d at 177. “Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.” *Id. citing Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991). It is only “[w]hen the application of the statute’s plain language would lead to absurd consequences that the Legislature could not possibly have intended,” that a court, out of absolute necessity, may stray from applying the literal language and resort to such extra-textual factors as legislative history, intent, or purpose. *Id. citing State v. Mason*, 980 S.W.2d 635, 638 (Tex. Crim. App. 1998) (*citing Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991)). The State submits that the language

of §37.10 is clear and unambiguous regarding the level of offense and the aggravating factors that determine that level.

Section 37.10(c)(1) does, generally, provide that an offense under this section is a Class A misdemeanor without the elements of to harm or defraud, in which case it is a state jail felony as initially held by the Fourth Court and the trial court. Tex. Pen. Code §37.10(c)(1) (West 2017); *Alfaro-Jimenez*, 2017 Tex. App. LEXIS 7225, at \*25. However, the section provides for exceptions to the general misdemeanor provision and actually begins with those exceptions: “*Except as provided by Subdivisions (2), (3), and (4), and by Subsection (d)*, an offense under this section is a Class A misdemeanor unless the actor’s intent is to defraud or harm another, in which event the offense is a state jail felony.” Tex. Pen. Code §37.10(c)(1) (West 2015) (emphasis added).

Specifically applicable to the instant case is subsection (2)(A), pursuant to which appellant was indicted, which provides that an offense is a *felony of a third degree* if the governmental record was

(A) a public school record, report, or assessment instrument required under Chapter 39, Education Code, data reported for a school district or open-enrollment charter school to the Texas Education Agency through the Public Education Information Management System (PEIMS) described by Section 42.006, Education Code, under a law or rule requiring that reporting, or a license, *certificate*, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States, *unless the actor’s intent is to defraud or harm another, in which event the offense is a felony of the second degree*;

Tex. Pen. Code §37.10(c)(2)(A) (West 2017) (emphasis added). Therefore, tampering with a governmental record of the types listed in subsection (A) plus proof of intent to defraud or harm another is a second degree felony.

A social security card is a “*certificate* issued by the United States”; therefore, it is a “governmental record” as defined by Texas Penal Code section 37.01(2)(c). *See Lopez v. State*, 25 S.W.3d 926, 929 (Tex. App. — Houston [1st Dist.] 2000, no pet.). Because the governmental record described in the indictment is a certificate issued by the United States, the offense charged would be a felony of the third degree. *See* Tex. Pen. Code §37.10 (c)(2)(A) (West 2017); *Lopez*, 25 S.W.3d at 929. However, if the State proves the charged intent to defraud or harm another, then the offense is a felony of the second degree. Tex. Pen. Code §37.01(c)(2)(A) (West 2017).

### **Application**

The State charged appellant in two paragraphs with the second degree felony offense pursuant to sections 37.01(a)(4),(5),(c)(2)(A) alleging that with intent to defraud and harm another appellant made, presented, or used a Social Security card containing a number not assigned to him with knowledge of its falsity; or with intent to defraud and harm another he possessed a social security card containing a number not assigned to him with intent that it be used unlawfully (C.R. at 4). Both

sides as well as the trial court acknowledged that petitioner was charged with a second degree felony (2R.R. at 6, 7, 24).

The jury charge defined governmental record as follows:

“Governmental record” means anything belonging to, received by, or kept by government for information, including a court record, anything required by law to be kept by others for information of government, or a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States.

(C.R. at 29).

Intent to defraud and harm were defined as follows:

“Intent to defraud” means the intent to cause another to rely upon the falsity of a representation, such that the other person is induced to act or to refrain from acting. “Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

(C.R. at 29, 30).

The jury was charged as follows tracking the language of the indictment:

Now, if you find from the evidence beyond a reasonable doubt that on or about the 10<sup>th</sup> Day of July, 2014, in Bexar County, Texas, the defendant, Pablo Alfaro-Jimenez, did, with *intent to defraud or harm another*, namely: Social Security Administration or Officer Edward Rodriguez, make, present, or use a governmental record, to-wit: *a social security Card* containing a number not assigned to Pablo Alfaro-Jimenez, by presenting said government record to Officer Edward Rodriguez for identification, and Pablo Alfaro-Jimenez made, presented or used the governmental record with knowledge of its falsity;

Or, if you find from the evidence beyond a reasonable doubt that on or about the 10<sup>th</sup> Day of July, 2014, in Bexar County, Texas, the defendant, Pablo Alfaro-Jimenez, did, with intent to *defraud or harm another*, namely: Social Security Administration, possess a governmental record, to wit: *a social security Card* containing a number not assigned to Pablo Alfaro-Jimenez, with intent that it be



used unlawfully, then you will find the defendant guilty of tampering with a governmental record with intent to defraud or harm as charged in the indictment.

If you do not so find beyond a reasonable doubt, if you have a reasonable doubt thereof, or you are unable to agree, you will next consider whether the defendant is guilty of the lesser included offense of tampering with a governmental record.

(C.R. at 31, 32)(emphasis added).

Now, if you find from the evidence beyond a reasonable doubt that on or about the 10<sup>th</sup> Day of July, 2014, in Bexar County, Texas, the defendant, Pablo Alfaro-Jimenez, did make, present, or use a *governmental record, to-wit: a social security card* containing a number not assigned to Pablo Alfaro-Jimenez, by presenting said government record to Officer Edward Rodriguez for identification, and Pablo Alfaro-Jimenez made, presented or used the governmental record with knowledge of its falsity;

Or, if you find from the evidence beyond a reasonable doubt that on or about the 10<sup>th</sup> Day of July, 2014, in Bexar County, Texas, the defendant, Pablo Alfaro-Jimenez, did possess a *governmental record, to-wit: a social security card* containing a number not assigned to Pablo Alfaro-Jimenez, with intent that it be used unlawfully, then you will find the defendant guilty of tampering with a governmental record.

(C.R. at 33)(emphasis added)

Thus the jury was charged in the first application paragraph as to both manner and means as alleged in the indictment with the element of to harm or defraud; a second degree felony. If the jury did not find the first charge beyond a reasonable doubt they were instructed to consider the offense of tampering a governmental record, to wit: a Social Security card, without the element of to harm or defraud; a third degree felony.

The jury found appellant guilty of tampering with a governmental record, to-wit: a Social Security card, but did not find he did so with intent to harm or defraud. This offense is a felony of a third degree pursuant to section (c)(2)(A). The trial court was authorized to assess punishment of imprisonment for any term not more than 10 years or less than 2 years. Tex. Pen. Code §12.34(a) (West 2017). A sentence that is outside the maximum or minimum range of punishment is unauthorized by law; and therefore, illegal. *Mizell*, 119 S.W.3d at 806.

Because the trial court assessed punishment outside the authorized punishment range under these facts, the Fourth Court had jurisdiction and authority to remand the cause to the trial court for resentencing under the proper level of offense, a third degree felony. *See Pfeiffer v. State*, 363 S.W.3d 594, 597 (Tex. Crim. App. 2012); *Ex parte Rich*, 194 S.W.3d 508, 511 n.3 (Tex. Crim. App. 2006); *Mizell*, 119 S.W.3d at 806; *Ex parte Pena*, 71 S.W.3d 336, 337 (Tex. Crim. App. 2002).

Appellant's fourth and fifth grounds for review are without merit and should be overruled.

## **Prayer**

WHEREFORE, PREMISES CONSIDERED, the State prays that this Court affirm the Fourth Court of Appeals.

Respectfully submitted,

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### **Certificate of Service**

I, Mary Beth Welsh, Assistant Criminal District Attorney, Bexar County, Texas, certify that on this, the 27<sup>TH</sup> day of June, 2018, copies of the foregoing brief were emailed to the following persons:

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### **Certificate of Compliance**

Pursuant to rules 71.3,9.4(i)(1)&(i)(2)(B) of the Texas Rules of Appellate Procedure, I, Mary Beth Welsh, Assistant Criminal District Attorney, Bexar County, Texas, certify that this foregoing brief contains 3,071 words from the State's Summary of the Pertinent Facts until, but excluding, the signature block.

/s/ *Mary Beth Welsh*  
MARY BETH WELSH